Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

PETER ALFRED MANTZ,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, Ninth District Of Texas At Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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October 28, 1996

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QUESTIONS PRESENTED

(1) Does the conviction herein violate Federal standards regarding sufficiency of the evidence on the basis that the evidence failed to establish the *actus reus* of the offense, thereby deciding an important question of federal law in a way that conflicts with relevant decisions of this Court?

(2) Does the conviction herein violate Federal standards regarding sufficiency of the evidence on the basis that the evidence failed to establish the *mens rea* of the offense, thereby deciding an important question of federal law in a way that conflicts with relevant decisions of this Court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, PETER ALFRED MANTZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, holding that the evidence was sufficient to support the conviction of indecency with a child in this cause.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Ninth District of Texas at Beaumont, Texas, is unpublished but appears in Appendix A to this petition as *Peter Alfred Mantz v. The State of Texas*, #09-94-178 CR, April 24, 1996.

This petition is timely filed in that it is filed seeking review of a lower state court judgment subject to discretionary review by the state court of last resort, the Texas Court of Criminal Appeals, Austin, Texas, within 90 days after the entry of the order denying discretionary review. The Texas Court of Criminal Appeals refused discretionary review on July 31, 1996. A copy of the order denying discretionary review by the Texas Court of Criminal Appeals appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals, Ninth District of Texas at Beaumont's opinion in this matter was filed on April 24,

1996. The Texas Court of Criminal Appeals refused discretionary review on July 31, 1996. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257, and pursuant to the U.S. Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution, a copy of which is appended as Appendix C, is involved to the extent that the decision of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, denied petitioner due process of law.

The statute upon which petitioner was convicted is Texas Penal Code, § 21.11, appended hereto as Appendix D.

STATEMENT OF THE CASE

This petition involves a conviction arising from a prosecution in the Criminal District Court of Jefferson County, Texas at Beaumont, Texas, of the felony offense of indecency with a child. Petitioner raised the federal questions involved before the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in the original Brief for Appellant timely filed with the Court of Appeals on May 12, 1995, by pointing out by specific citations references in the trial record and the opinions of this Court requiring an acquittal. The portion of petitioner's original brief complaining of the insufficiency of the evidence and setting out the federal authority and citations to opinions of

this Court warranting a reversal of the conviction is found on page 18 and 19 of the original Brief for Appellant before the Court of Appeals and is appended hereto as Exhibit E.

Petitioner, Dr. Peter Alfred Mantz, contends that the evidence was insufficient to support the conviction of indecency with a child. While a complete review of the evidence including the videotapes introduced as State's Exhibit No. 1 and No. 2 are necessary in order to evaluate this issue should this grant a writ of certiorari, petitioner details the pertinent testimony as follows:

WITNESSES FOR THE STATE:

Martin Mantz – Dr. Mantz's [petitioner] youngest child, Martin, who was the complainant in Cause No. 63480 in which appellant was acquitted, testified at the age of six and one-half. Before the jury he responded to leading questions of the prosecutor concerning an anatomically correct doll that he felt "rubbing on his butt". He testified that Dr. Mantz "might have done something like that". He further testified that his reason for stating it was his father was "because I [Martin] just said it." Upon cross-examination, petitioner pointed out that the child witness had related on State's Exhibit No. 1 that his father had not touched him in that manner, that he had previously testified in January to a contradictory story, and that his testimony at this trial was a third version. The child admitted that the prosecutor had been practicing with him and helping him explain the incident. When asked by the prosecutor if he had told any lies, the child answered: "I don't know. Maybe. No." The incredible nature of the testimony is obvious from the child's final

remarks to the jury in response to questioning by petitioner as follows:

Q. [Petitioner]: Then again today. We have three different versions or stories. I'm not trying to trick you. We're not going to go into it.

(Indicates) I'm just asking you on two occasions, tape and January, you never said it was that man in all of your other testimony, Son. You said you didn't even know. Now – now –

A. [Child Martin]: I'm thinking which one I'm going to stick with.

Q. That's all I'm trying to find out, Bub. That's the best remark I've heard today.

MR. RADFORD: Your Honor, I object to sidebar comment.

THE COURT: Overruled.

CONTINUED BY MR. SPARKS:

Q. Which one are we going to stick with; the tape, January or today?

A. It's not going to be that tape.

Q. Not that tape.

How about January?

A. (Indicates) Maybe this one.

Q. Maybe this one?

A. Uh-huh.

. . .

Q. Son, do you even know what you are doing here? Do you know –

A. Telling the truth.

Q. This time we're telling the truth?

A. Uh-huh.

Q. Now, again I'm going to ask you. We going to go with the tape, the January version or today's story?

A. I told you maybe today.

Q. Maybe today.

How old are you, Bub, now?

A. I'm six.

Q. Six.

A. And I know how old my dad is.

Q. How old is ol' Peter?

A. 51."

In State's Exhibit No. 1, the child had related in the videotaped interview that someone had "rubbed his bottom hard on top of his pants". He had related that the person was a man with "brown eyes, brown hair and disguised like a detective, with yellow hands, a face and a mask." He related that he did not remember as to whether he had ever felt his dad rubbing him.

Paul Mantz – Dr. Mantz's [petitioner] eldest son, Paul, who was the complainant in Cause No. 63479 in which case appellant stands convicted and is the basis of this petition, testified at the age of eight. Of critical importance is the fact that this witness never testified that

anyone actually touched his anus, as alleged in the indictment. Upon direct questioning, he testified that someone touched him "around the anus", and it was "sort of like a hard rubbing". He said he did not know who it was, but it "looked like my dad". State's Exhibit No. 3 was admitted, which was a drawing of a "protective device" he had drawn to ward off an offender. Upon cross-examination, he admitted that his mother had rehearsed his testimony and told him that through the process of elimination, the perpetrator had to have been his father. He said it could have been his father, but his mother had rehearsed both with him and his brother. In State's Exhibit No. 2, the videotaped interview of the child witness, he testified upon leading questioning that his dad would "come around and sort of cuddle up to him", which would hurt him. He additionally related on the videotape that his father would touch him with his father's stomach, but his father "didn't mean to, though." In said interview, he described a masked man with a headcap with flaps off the side and blue eyes being the mystery person, who was really his dad. (Petitioner's eyes were brown.) In said interview, he related that the actual alleged "touching" was a rubbing by his father's stomach. In response to a question as to whether he ever felt anything "where you number 2 from", he replied "no". Any alleged "touching" was on top of his pajamas, and he never felt anything touch him underneath his pajamas. In said interview, he admitted that his mother had told him what to talk to the interviewer about on that occasion. State's Exhibit No. 2.

Marina Mantz – Dr. Mantz's [petitioner] estranged wife, Marina Mantz, began her direct examination by relating her contention that the child Paul was making a

movement of thrusting his hips, which he said "daddy does in bed with me". She testified that the child had related the incident as "a rubbing that hurt". She claimed that appellant became intoxicated on a regular basis in the evenings, and that she would find petitioner coming out of the children's room in the early morning hours. She further related sexual problems in their marriage. She claimed to have observed appellant in the shower with his two sons and claims appellant was "dangling his penis over Paul's shoulder and sliding it back and forth." She related that she had left the bathroom door open so she could look inside, however, no testimony was offered as to how she could see through a shower curtain or other closure. She claimed, at one point, to have reported the incident of March of 1990 to the Child Protective Services. The result of the investigation conducted by the Child Protective Services at that time was that the alleged abuse was "unsubstantiated". She claimed to put a sliding gate at the door to the children's bedroom, and that she had observed petitioner on occasions tripping over the gate, when he would remark that he was getting the children a drink of water. She thereafter claimed that the child Martin complained of "something bothering his bottom at night", at which time she contacted State's witness, Dr. Del Campo. She testified that she made arrangements to take the children and leave in the middle of October of 1992. Upon cross-examination, she contended that she had anonymously reported the incident to CPS in 1990, and then again reported it in June of 1992, thereafter taking the children to the witness, Dr. Del Campo. She claimed that her June, 1992, report to CPS was again anonymous. Of importance to the sequence of

events, she admitted that the videotaped interviews of the children were conducted on or before October 2, 1992. Although she refused to admit the date she had taken the children to see Dr. Jay Proctor, the family physician, she admitted that she did not disclose any information concerning any alleged abuse to the children's regular doctor. Defendant's Exhibit No. 1 was then admitted into evidence, which was a letter from Dr. Del Campo to CPS which included the statement that the mother "suspected" sexual abuse by petitioner. A review of said exhibit reveals that there is the handwritten notation concerning the suspected sexual abuse that it was "not confirmed". Said exhibit noted that the prior report of suspected abuse was found unsubstantiated, and that the "current basis for the suspicion of abuse [was] not very solid". The observation of the witness Del Campo was to the effect that he shared with the witness, Marina Mantz, that petitioner should be kept in the dark concerning the suspicions and allegations because to notify him would make the case more difficult to prove. She thereafter detailed her marital history and the ongoing divorce proceedings. Upon redirect examination, she claimed to have related to Decima Mantz, the mother of Dr. Mantz, the problems with Dr. Mantz and the children around Christmas of 1991. Petitioner then introduced Defendant's Exhibit No. 2, a latter dated the following August from the witness, Marina Mantz, to petitioner's mother in England, wherein no mention whatsoever was made of any such alleged abuse or any alleged problems.

Jacqueline Ryall – The State called an attorney who had been appointed to represent the children as attorney ad litem in the divorce proceedings. She related that

petitioner had told her of an extraneous incident wherein appellant had masturbated in bed while his nine-month old child, Paul, was asleep in the bed. She additionally testified that the child, Paul, had identified the perpetrator, not as petitioner, but that the perpetrator "maybe was his mother".

Detective Joe Ball – This investigating officer testified that in mid-October of 1992, he appeared at the residence of petitioner, and was invited into his home. He related that petitioner became agitated at the investigation, and agreed to follow the detective to the Beaumont Police Department in his personal vehicle in order to give a written statement. The State's Exhibit No. 4, the voluntary statement of Dr. Mantz rendered to said witness, was introduced and published to the jury. He further related that petitioner had spoken to the Public Relations Office to investigate whether or not the detective was actually a police officer, because petitioner suspected that the man had kidnapped his wife and children and may have harmed them. (The witness had related that this was the occasion in which Marina Mantz had taken the children from their home and fled to a women's shelter based upon this witness' advice.) Upon cross-examination said witness testified that, after having interviewed Marina Mantz, and been present when the videotapes, State's Exhibits No. 1 and No. 2 were conducted, he related to CPS worker Hodge that "he really did not have anything to base a case on." He conceded that he had stated that he would "try to run a bluff by petitioner". Petitioner contends that this "bluff" resulted in State's Exhibit No. 4, an exculpatory statement of petitioner. He again conceded that at that point in his investigation "there wasn't much

of a case". Said statement of petitioner contained entirely exculpatory information, including that perhaps one of the household animals was bothering the children, and that he fixed the latch to the bedroom door in order to alleviate any such potential problem. He additionally confirmed that he did in fact go into the children's room at night and would in fact give the elder son, Paul, a drink of water upon his request. In said statement, petitioner vehemently denied sexually abusing his sons.

WITNESSES FOR THE DEFENSE:

Dr. Enrico Del Campo – Dr. Del Campo, a child psychiatrist, testified that he first interviewed the children July 2, 1992, at the request of Marina Mantz. Said witness admitted that Marina Mantz told him on July 2, 1992, that petitioner was under suspicion for some sexual abuse of both children, but he did not report it until September 16, 1992, to any law enforcement agency or child protective services, despite his legal duty to report it upon any such suggestion of sexual abuse to a child. On cross-examination, he also admitted that his opinion that the "current basis for the suspicion of abuse [was] not very solid" was based not only upon his evaluation of the children, but on the whole circumstances.

Dr. Jay Proctor – The family physician of the Mantz family and the subject children testified that he had occasion to see Martin Mantz on June 22, 1992, and Paul Mantz on June 29, 1992. His testimony and records reflected that at that time there was no report by the mother of any sexual abuse, nor did he observe or discover anything related to anything wrong or abnormal. He related that there was absolutely no information

related by Marina Mantz concerning her contentions at trial of alcoholism by Dr. Peter Mantz, any perversion by Dr. Mantz directed toward his children, or any outcry from Marina Mantz whatsoever.

Patricia Romano – An x-ray technician, Pat Romano, testified that she had known Dr. Mantz approximately twelve to fifteen years, through meeting him at a neighborhood cafe near Tyrrell Park Golf Course. She testified that she saw petitioner over a ten to fifteen year time period on weekends at said cafe, had observed petitioner drink beer on occasion, but not to excess.

Clayton Ayers – A vice-president of a local company and neighbor of petitioner, Clayton Ayers, testified that he had been a neighbor of petitioner for approximately eleven years. He testified that he had seen petitioner drink beer occasionally, but had never observed him in a state of intoxication. He additionally testified that petitioner was active with his children.

Judy Holt – Child Protective Services worker Judy Holt testified pursuant to subpoena by petitioner. She indicated that the file of CPS was opened on September 18, 1992. She testified no record existed concerning a 1990 complaint directed toward Dr. Mantz, which meant that "it was most probably invalid and destroyed". Upon cross-examination, she replied to a hypothetical situation based upon the evidence adduced at trial that if the events in June of 1992 had been as related by the State's witnesses, as a CPS worker she would have begun an investigation. When the prosecution attempted to establish that her CPS records indicated that an anonymous complaint had been made, she indicated that she did not

have the piece of paper to which the prosecutor was alluding. The records were never introduced into evidence.

Kimberly Hanks – The person conducting the videotaped interviews, State's Exhibits No. 1 and No. 2, was a CPS worker who testified upon subpoena by petitioner. Said witness was cross-examined concerning why she suggested answers to the children, such as suggesting to Martin the perpetrator had a beard. She was further cross-examined as to why she suggested the perpetrator as "dad", which she conceded was an error she made in the questioning. This witness was cross-examined concerning her interview techniques, including her questioning suggesting to the children that she "could not help them unless they told her everything". Despite her training and experience related to the jury, she testified that she did not believe that children could be influenced any easier than an adult.

Decima Mantz – The mother of petitioner Dr. Mantz, Decima Mantz, who was a resident of England, traveled to Jefferson County, Texas, in order to testify in the trial. Regarding the testimony of Marina Mantz to the effect that she had suggested petitioner had a drinking problem and had committed abuse of his children, she testified to the jury that such was "utter nonsense". She additionally testified that Marina Mantz had not advised her or written her concerning such allegations. She testified that she had never observed petitioner indulging in alcohol to excess, and that petitioner was by nature pleasant and patient, and was a placid, patient, very understanding man. State's Exhibit No. 6, a letter from petitioner's

mother to petitioner was introduced, which letter contained statements that the wife Marina Mantz constantly griped about petitioner, went into bad temper tantrums, and was a highly strong neurotic young woman. She related that petitioner, was a devoted father to his two sons and that Marina Mantz was capable of intending to cause petitioner harm and be vindictive.

Dr. Peter Mantz – Petitioner testified regarding his life in England, his career in the British Merchant Navy, and his education to obtaining his Ph.D. in civil engineering. At the time of trial, he was a full professor in the College of Civil Engineering at Lamar University, with numerous research and governmental responsibilities, often working ten to twelve hours a day. He testified that he spent every evening and weekend with his children. He testified regarding his conversation with CPS worker Pat Huckaby regarding her investigation in 1990, that the case was closed because there was no evidence of abuse since nothing had happened. Petitioner unequivocally stated that he never committed any act related to molestation of his children. Petitioner testified that such abuse was "not in his thoughts" and was appalled at such proceedings. Upon cross-examination, he was questioned concerning his statement that the initial accusations were bizarre and unfounded. He stated that he did in fact have some notes, which were privileged, but said documents were promptly handed to the prosecutor by trial counsel for petitioner at that time. He testified regarding his conclusion that the family dog may have been bothering the children, on the basis that there was perhaps no other explanation for any such incident. Petitioner detailed why he was appalled and angered, to the effect that there

was no abuse, but the end result had been that his children were being damaged. He testified that his children were his life and that he would protect his children for the rest of his life against these false allegations.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the Court of Appeals, Ninth District of Texas at Beaumont, Texas, has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. The Court of Appeals issued an opinion that renders the decisions of this Court concerning insufficiency of the evidence to be of no consequence.

> **(I) Corpus delicti.** "The body of a crime. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has been committed." *Black's Law Dictionary, 4th Ed.*, 1968.

Petitioner contends that the evidence of *any* abuse of the children is remarkably underwhelming. The State simply failed to prove the *corpus delicti.* In viewing the evidence in the light most favorable to the verdict as required by law, there was insufficient evidence to establish that petitioner committed the act of sexual contact as alleged in the indictment. At best, the evidence only established, if at all, that the child testified to some rubbing *around* the anus, but no actual sexual contact by anyone. The testimony of both children evidences the fact that it is questionable whether anything even happened at all. The testimony of the younger child of course

indicated three different versions, and that the child "maybe" was telling the truth when he decided which version to "stick with". The evidence established that the child Paul even claimed at one point that "the mother did it". Such evidence is grossly insufficient to establish guilt, much less establishing that anyone, and petitioner in particular, even committed any criminal act at all.

Petitioner contends that the evidence is insufficient to establish the *actus reus* of the statutory offense, in that the evidence was insufficient to establish sexual contact of the anus. A specific description of the term "anus", and the fact that sexual contact does not mean a touching of the buttocks, is discussed in *Wright v. State*, 693 S.W.2d 734 (Tex.App. – Dallas 1985). In reversing the conviction in *Wright, id.*, of indecency with a child, the court held that a charge of sexual contact with a victim's buttocks and not his anus fails to allege criminal conduct under the Texas Penal Code. The State alleged sexual contact with the anus of the child Paul Mantz, and, having particularly alleged said body part, it was incumbent upon the State to prove an actual touching of that body part. See *Bryant v. State*, 685 S.W.2d 472 (Tex.App. – Ft. Worth 1985). In reversing the conviction of fondling in *Nelson v. State*, 505 S.W.2d 551 (Tex.Cr.App. 1974), the Texas Court of Criminal Appeals held that the testimony of a nine-year old prosecutrix to the effect that the accused "rubbed her chest" was insufficient evidence to sustain an allegation that the accused had sexual contact with her breasts. Likewise, the vague and contradictory testimony failed to establish *any* actual sexual contact with the anus. As detailed above, the child Paul testified that the only touching was "around the anus", if one is to even believe

that testimony at all. If there is insufficient proof to establish that the act even occurred, it has long been held in Texas jurisprudence that a conviction may not stand. As long ago as 1954, the Texas Court of Criminal Appeals held that even though an accused had previously been convicted of the felony of sodomy in Jefferson County, Texas, the failure to establish an act of fondling with a lascivious intent as alleged required a reversal of the conviction. *Wilson v. State*, 266 S.W.2d 131 (Tex.Cr.App. 1954). It is axiomatic that the State is required to adduce sufficient evidence to establish that the criminal act occurred; such evidence is noticeably absent in the case at bar. The extraneous allegations of acts committed with the other child Martin of course cannot be considered as evidence of the occurrence of the allegations in the case involving Paul, in that even the jury was not convinced beyond a reasonable doubt of the commission by petitioner of those extraneous allegations, as evidenced by their acquittal of him in the companion Cause #63480.

> **(II) Actus non facit reum, nisi mens sit rea.** "An act does not make the actor guilty, unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime." Lord Kenyon, C. J., 7 Term 514; English Common Law.

Petitioner additionally contends that there was absolutely no evidence, from any source, to establish that any act was committed with the intent to arouse or gratify the sexual desire of Dr. Mantz, as alleged in the indictment. In order to constitute the offense of indecency with a child, the State must plead and prove that any act of sexual contact was committed with the intent to arouse or

gratify the sexual desire of a person. In reversing the conviction of indecency with a child in *Wesley v. State*, 548 S.W.2d 37 (Tex.Cr.App. 1977), the Texas Court of Criminal Appeals pointed out that the intent to arouse or gratify sexual desire is an essential element of the offense and its omission is fundamental error. In reversing the conviction for the offense of indecency with a child in *Slavin v. State*, 548 S.W.2d 30 (Tex.Cr.App. 1977), the Texas Court of Criminal Appeals likewise held that the offense requires proof that any sexual contact of a child be done with the intent to arouse or gratify the sexual desire of someone, and its omission is fundamental error.

The appellate was supposed to review the evidence in the light most favorable to the verdict to determine if any rational trier of fact could have found each element of the offense beyond a reasonable doubt, as this United States Supreme Court has held. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979). The Court failed to adequately apply this standard. In an analogous case, a Texas appellate court found the evidence insufficient to support a conviction of indecency with a child in *Bermudez v. State*, 878 S.W.2d 227 (Tex.App. – Corpus Christi 1994), wherein the accused complained that the State had offered no evidence that he had intentionally exposed himself to a child nor any evidence that an exposure occurred with intent to arouse or satisfy his sexual desire. In agreeing and reversing the conviction, the Court pointed out that the State was attempting to rely heavily on prior inconsistent statements of the child and the child's mother in order to support the conviction. Much of the direct examination was inquiry about what the State's witnesses had told others on various occasions.

The State even attempted to support its conviction with testimony of similar offenses by the accused, exposing himself on one or more other occasions. The Court held that no rational trier of fact could have found each element of the offense of indecency with a child beyond a reasonable doubt.

In another case involving facts compellingly similar to the case at bar, a Texas appellate court held the evidence insufficient to support the conviction of indecency with a child in *Baker v. State*, 781 S.W.2d 688 (Tex.App. – Ft. Worth 1989). The evidence established that the accused had picked up his niece who had fallen and cut her head in order to take her to the bathroom. The niece complained that he placed his hand on her crotch, where she was wearing only panties, although the accused denied that he ever placed his hand on her genitals or that he did so with the intent to arouse or gratify his sexual desire. The child testified that he did place his hand upon her genitals, although she did not know if it was an accident although it seemed like he was doing it on purpose. Said testimony is strikingly similar to the testimony of Paul in State's Exhibit No. 2 wherein he related that any alleged touching was a rubbing by his father's stomach, and that his father "didn't mean to, though". In *Baker, id.*, the State introduced extraneous offenses to bolster its evidence of intent to gratify, including (1) appellant's allowing his niece and her friend to enter his bedroom where he stood naked talking on the phone; (2) an occasion in which the accused tossed his niece in a swimming pool by placing his hand in her crotch; (3) an occasion when the accused had gotten into bed with his niece at night and squeezed her, during

which time he had an erection; and (4) a time in which the accused entered the niece's bedroom while she was in bed and pulled up her nightgown and looked at her chest. The appellate court held that there was no evidence that the accused in that case acted with the requisite mental state during any of the extraneous offenses, and absent an inference that he acted with intent to engage in sexual contact, even the extraneous evidence was not sufficient to sustain the conviction. The Court could have been addressing the evidence adduced in this trial when it stated at page 690:

> "The evidence is insufficient to prove any sexual contact occurred, or that any contact occurred with the intent to arouse appellant's sexual desires. We hold that no rational trier of fact could have found the essential element of intent beyond a reasonable doubt. As a result, a discussion of appellant's remaining points of error is unnecessary. Because the conviction must be reversed for insufficiency of the evidence to support the finding of guilty, the cause is remanded to the trial court with an order to enter a judgment of acquittal. See *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Green v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978)."

A review of the evidence of the case at bar reveals that no rational trier of fact could have found that any criminal act occurred. Even if one were to presume, *arguendo*, that some contact was made while Dr. Mantz slept in the bed with the child Paul, there is absolutely no evidence from any source that any contact was sexual contact, or that it was made with the intent to arouse or gratify Dr. Mantz. The child Paul's version of being touched by his father's stomach by cuddling up to him,

which he described as being perpetrated by a blue-eyed masked man with a headcap with flaps off the side (or perhaps it was his mother as he related to attorney Jacqueline Ryall), reveals the weakness of the evidence to conceive of supporting a conviction in this cause. His statement that his father "didn't mean to, though" absolutely defeats any attempt by the State to establish some intent to arouse or gratify any sexual desire. Not only is the evidence in this cause insufficient to support the conviction, but it overwhelmingly establishes the innocence of petitioner Dr. Peter Mantz. For this reason, petitioner urges that this Court grant a writ of certiorari to review the opinion of the Court of Appeals, Ninth District of Texas, and that a judgment of acquittal be entered.

This Court should grant certiorari to determine these issues and to resolve the conflict between the opinion of the Court of Appeals, Ninth District of Texas, and this Court in the various cases relating to said issue.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth District of Texas at Beaumont, Texas, in this case.

DATED: October 25, 1996

Respectfully submitted,

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APPENDIX A

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-94-178 CR

PETER ALFRED MANTZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Cause No. 63479

OPINION

(Filed Apr. 23, 1996)

Peter Mantz was indicted in two separate causes for the alleged offense of indecency with a child, his two sons, P. and M. The prosecutions were joined. Mantz was convicted by the jury of indecency with a child as to P. but found not guilty as to M. He was sentenced to ten years, probated, and a $10,000 fine. Mantz raises four points of error on appeal.

Points of error one and two allege insufficient evidence to support the conviction in that the State failed to

establish both sexual contact and the requisite intent as alleged in the indictment. The indictment alleged Mantz "did then and there with intent to arouse and gratify the sexual desire of [Mantz] have sexual contact by touching the anus of [complainant], a child. . . . "

Mantz contends the evidence is insufficient to establish sexual contact of the anus. P.'s testimony was as follows:

[THE STATE]: Okay. What is the back part of your body that's the private part called?

[P.]: (No answer).

[THE STATE]: What do you call it?

[P.]: Butt.

[THE STATE]: Okay, the butt. Have you ever heard of the word anus?

[P.]: Yes.

[THE STATE]: Is that also called an anus?

[P.]: Yes.

[THE STATE]: Okay, what would happen sometimes at night when you got touched in a bad place?

[P.]: Well, I'd usually be in bed, but unsuspectedly I'd – someone would come in the room and touch me in the wrong places."

[THE STATE]: Okay. What places would they touch you?

[P.]: Around the anus.

[THE STATE]: Okay. did it hurt?

[P.]: Yes.

In reviewing the sufficiency of the evidence, this court must determine whether, considering the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560, 573 (1979). The standard is applicable to both direct and circumstantial evidence cases. *Geesa v. State*, 820 S.W.2d 154, 163 (Tex. Crim. App. 1991).

The jury is the trier of fact, the sole judge of the credibility of the witnesses and the weight to be given their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979). The jury may accept or reject all or any part of the testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Contradictions in the evidence are reconciled by the jury and will not result in reversal so long as there is enough credible testimony to support the verdict. *Bowden v. State*, 628 S.W.2d 782 (Tex. Crim. App. 1982). Additionally, the jury may use common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when given effect to the inferences that may reasonably be drawn from the evidence. *Wawrykow v. State*, 866 S.W.2d 87, 88 (Tex. App. – Beaumont 1993, pet. ref'd).

In *Jones v. State*, 900 S.W.2d 392, 399 (Tex. App. – San Antonio 1995, pet. ref'd), the court found sufficient evidence to support a finding of contact where the complainant testified the defendant touched her behind with his penis and that it hurt. "Thus the jury could properly conclude from common knowledge what part of the behind would hurt when 'touched' with a penis . . . " *Id.* In *Johnson v. State*, 882 S.W.2d 39, 41 (Tex. App. – Houston

[1st Dist.] 1994, pet. ref'd), the court found sufficient evidence of contact where the complainant testified the defendant touched "her private part" and the complainant's mother testified the complainant referred to her vagina as her "private part".

As recognized by the court in *Jones v. State*, 817 S.W.2d 854, 856-857 (Tex. App. – Houston [1st Dist.] 1991, no pet.). "The testimony of a sexual assault victim alone is sufficient evidence . . . even if the victim is a child using unsophisticated language to describe the act." Child victims of violent crimes are not expected to testify with the same clarity and ability as is expected of mature and capable adults. *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990); *see also Hemphill v. State*, 826 S.W.2d 730, 733 (Tex. App. – Houston [14th Dist.] 1992, pet. ref'd). "To expect such testimonial capabilities of children would be to condone, if not encourage, the searching out of children to be the victims of crimes such as the instant offense in order to evade successful prosecution." *Villalon*, 791 S.W.2d at 134.

P. testified Mantz touched him "around the anus" and that it hurt. Mantz argues "around the anus" means the "butt" and therefore no contact of the anus was established. The jury, as trier of fact, could use their common sense and properly conclude what part of the "butt" would hurt when touched. We find the evidence sufficient to support a finding of contact as alleged. Point of error one is overruled.

As to intent, "[a] culpable mental state is nearly always proven by circumstantial evidence. . . . One's acts are generally reliable circumstantial evidence of one's

intent." *Guidry v. State*, 896 S.W.2d 381, 386-387 (Tex. App. – Texarkana 1995, pet. ref'd) (citations omitted). "[T]he requisite specific intent to arouse or gratify the sexual desire of any person can be inferred from the defendant's conduct, his remarks and all surrounding circumstances." *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981). A number of courts have found the evidence of the act itself sufficient for the trier of fact to infer the requisite intent. *See Nelson v. State*, 893 S.W.2d 699, 704-705 (Tex. App. – El Paso 1995, no pet.) (evidence the defendant touched the complainant's genitalia was sufficient); *see also Gottlich v. State*, 822 S.W.2d 734, 741 (Tex. App. – Fort Worth 1992, pet. ref'd) (evidence that defendant placed his finger inside her "private" was sufficient); *Hill v. State*, 852 S.W.2d 769, 771 (Tex. App. – Fort Worth 1993, pet. ref'd) (evidence that defendant placed his mouth on complainant's sexual organ was sufficient); *Fetterolf v. State*, 782 S.W.2d 927, 933 (Tex. App. – Houston [14th Dist.] 1989, pet. ref'd) (evidence that defendant circled complainant's breast with his hand was sufficient).

The jury in the present case clearly believed Mantz intended to arouse his sexual desire when he touched P. and was not engaged in some innocent activity. Consistent with our duty to view the evidence in the light most favorable to the verdict, we find a rational trier of fact could have found beyond a reasonable doubt that Mantz touched P. with the intent to arouse or gratify his (Mantz') sexual desire. Point of error two is overruled.

The third point of error claims Mantz was denied due process of law by the investigatory techniques in the interviewing of the children. Mantz contends the leading

nature of the videotaped interview so tainted the children's testimony that the conviction, based on their videotaped and in-court testimony, denied him due process.

In cases dealing with child witnesses, the rule against leading questions is somewhat relaxed. *Moon v. Satte*, 856 S.W.2d 276, 279 (Tex. App. – Fort Worth 1993, pet. ref'd). "The asking of leading questions is seldom a ground for reversal (especially where a child is testifying.)" *Uhl v. State*, 479 S.W.2d 55, 57 (Tex. Crim. App. 1972). In *Trevino v. State*, 783 S.W.2d 731, 733 (Tex. App. – San Antonio 1989, no pet.), the court found the appellant was not prejudiced as a result of leading questions where substantially the same testimony was elicited by appellant's counsel on cross-examination. The court in *Romines v. State*, 717 S.W.2d 745, 749 (Tex. App. – Fort Worth 1986, pet. ref'd), noted that even though many of the interviewer's questions were leading, there was no suggestion of answers to the crucial testimony concerning the offense. Therefore, the court found, the questions were not impermissibly suggestive. *Id.*

Our review of the videotapes persuades this court the interviewer's questions were not leading. Certainly, they did not suggest answers to the children for the crucial testimony concerning the offense. Additionally, substantially the same testimony was elicited both on direct examination without any objection from Mantz and on cross-examination. Furthermore, Mantz never asked the court to edit out questions and answers be challenged as leading and therefore waived this allegation on appeal. *See Moon*, 856 S.W.2d at 279; *see also Cisneros v. State*, 692 S.W.2d 78, 82 (Tex. Crim. App. 1985). Point of error three is overruled.

Mantz' fourth point of error alleges fundamental error occurred when the State elicited testimony concerning an extraneous incident. The State argues Mantz failed to preserve any such error for review by not objecting to the complained of testimony. Preservation of error concerning the admission of evidence in criminal cases is governed by TEX. R. CRIM. EVID. 103(a)(1) and TEX. R. APP. P. 52. These rules provide that if, on appeal, a defendant claims the trial judge erred in admitting evidence offered by the State, the defendant must have preserved error by making a timely and specific objection and obtaining an adverse ruling on that objection from the trial court. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). No objection was made when the testimony concerning an extraneous incident was offered; therefore no error was preserved for review. Point of error four is overruled.

Having overruled all points of error, the judgment of the trial court is affirmed.

AFFIRMED.

DON BURGESS
Justice

Submitted on February 15, 1996
Opinion Delivered April 24, 1996
Do not publish

Before Walker, C.J., Burgess, and Stover, JJ.

APPENDIX B

(Seal) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
July 31, 1996
COA#: 09-94-00178-CR
RE: Case No. 0821-96
STYLE: MANTZ, PETER ALFRED

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

DOUGLAS M BARLOW
485 MILAM
BEAUMONT TX 77701

MAIL TO:

APPENDIX C

AMENDMENT V TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in times of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Texas Penal Code, § 21.11

§ 21.11. Indecency with a Child

(a) A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he:

(1) engages in sexual contact with the child; or

(2) exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person.

(b) It is a defense to prosecution under this section that the child was at the time of the alleged offense 14 years or older and had, prior to the time of the alleged offense, engaged promiscuously in:

(1) sexual intercourse;

(2) deviate sexual intercourse;

(3) sexual contact; or

(4) indecent exposure as defined in Subsection (a)(2) of this section.

(c) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than two years older than the victim and of the opposite sex; and

(2) did not use duress, force, or a threat against the victim at the time of the offense.

(d) An offense under Subsection (a)(1) of this section is a felony of the second degree and an offense under Subsection (a)(2) of this section is a felony of the third degree.

APPENDIX E

* * *

arouse or gratify the sexual desire of someone, and its omission is fundamental error.

This Court must review the evidence in the light most favorable to the verdict to determine if any rational trier of fact could have found each element of the offense beyond a reasonable doubt, as the United States Supreme Court has held. *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 560 (1979). In an analogous case, a Texas appellate court found the evidence insufficient to support a conviction of indecency with a child in *Bermudez v. State,* 878 S.W.2d 227 (Tex.App. – Corpus Christi 1994), wherein the accused complained that the State had offered no evidence that he had intentionally exposed himself to a child nor any evidence that any exposure occurred with intent to arouse or satisfy his sexual desire. In agreeing and reversing the conviction, the Court pointed out that the State was attempting to rely heavily on prior inconsistent statements of the child and the child's mother in order to support the conviction. Much of the direct examination was inquiry about what the State's witnesses had told others on various occasions. The State even attempted to support its conviction with testimony of similar offenses by the accused, exposing himself on one or more other occasions. The Court held that no rational trier of fact could have found each element of the offense of indecency with a child beyond a reasonable doubt.

In another case involving facts compellingly similar to the case at bar, a Texas appellate court held the evidence insufficient to support the conviction of indecency

with a child in *Baker v. State,* 781 S.W.2d 688 (Tex.App. – Ft. Worth 1989). The evidence established that the accused had picked up his niece who had fallen and cut her head in order to take her to the bathroom. The niece complained that he placed his hand on her crotch, where she was wearing only panties, although the accused denied that he ever placed his hand on her genitals or that he did so with the intent to arouse or gratify his sexual desire. The child testified that he did place his hand upon her genitals, although she did not know if it was an accident although it seemed like he was doing it on purpose. Said testimony is strikingly similar to the testimony of Paul in State's exhibit No. 2 wherein he related that any alleged touching was a rubbing by his father's stomach, and that his father "didn't mean to, though". In *Baker, id.,* the State introduced extraneous offenses to bolster its evidence of intent to gratify, including (1) appellant's allowing his niece and her friend to enter his bedroom where he stood naked talking on the phone; (2) an occasion in which the accused tossed his niece in a swimming pool by placing his hand in her crotch; (3) an occasion when the accused had gotten into bed with his niece at night and squeezed her, during which time he had an erection; and (4) a time in which the accused entered the niece's bedroom while she was in bed and pulled up her nightgown and looked at her chest. The appellate court held that there was no evidence that the accused in that case acted with the requisite mental state during any of the extraneous offenses, and absent an inference that he acted with intent to engage in sexual contact, even the extraneous evidence was not sufficient to sustain the conviction. The Court could have

been addressing the evidence adduced in this trial when it stated at page 690:

> "The evidence is insufficient to prove any sexual contact occurred, or that any contact occurred with the intent to arouse appellant's sexual desires. We hold that no rational trier of fact could have found the essential element of intent beyond a reasonable doubt. As a result, a discussion of appellant's remaining points of error is unnecessary. Because the conviction must be reversed for insufficiency of the evidence to support the finding of guilty, the cause is remanded to the trial court with an order to enter a judgment of acquittal. See *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Green v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978)."

A review of the evidence of the case at bar reveals that no rational trier of fact could have found that any criminal act occurred. Even if one were to presume, *arguendo*, that some contact was

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